Supreme Court, U.S.
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No. 00-1799

In The

Supreme Court of the United States

JACQUELINE TURNER,

Petitioner,

v.

BENEFICIAL CORPORATION,
BENEFICIAL NATIONAL BANK USA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ALAN S. KAPLINSKY
BURT M. RUBLIN
Counsel of Record
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether detrimental reliance must be proven to recover actual damages for an alleged disclosure violation arising under the Truth in Lending Act ("TILA"), 15 U.S.C. §§1601, *et seq.*

2. Whether detrimental reliance must be proven to recover damages in a civil RICO action predicated on alleged mail and wire fraud.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding. The ultimate corporate parent of respondents Beneficial Corporation and Beneficial National Bank USA is Household International, Inc., which is a publicly-held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 2

I. The Circuit Courts Uniformly Have Held That Plaintiffs Must Prove Detrimental Reliance to Recover Actual Damages Under TILA 4

II. The Decision Below Presents No Question of Exceptional Importance 9

III. The Legislative History of TILA Supports a Detrimental Reliance Requirement 12

IV. The Eleventh Circuit's Requirement of Detrimental Reliance For Civil RICO Actions Predicated on Mail or Wire Fraud Does Not Conflict with the Third or Fifth Circuits ... 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Akin v. Q-L Investments, Inc., 959 F.2d 521 (5th Cir. 1992) 4

Appletree Square I v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) 16

Bolin v. Sears, Roebuck & Co., 231 F.3d 970 (5th Cir. 2000) 4, 18

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 9

Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 16

Chisolm v. TranSouth Finance Corp., 95 F.3d 331 (4th Cir. 1996) 16

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 16

Cullen v. Whitman Medical Corp., 188 F.R.D. 226 (E.D. Pa. 1999) 3, 17

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 16

Ideal Dairy Farms, Inc. v. John Labatt, Inc., 90 F.3d 737 (3d Cir. 1996) 3, 17

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (U.S. Feb. 20, 2001) 10

Patterson v. Mobil Oil Corp., 241 F.3d 417 (5th Cir. 2001) 4, 18

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991) 1, 15

TABLE OF AUTHORITIES – Continued

Page

Perrone v. General Motors Acceptance Corp., 232 F.3d 433 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1601 (U.S. April 16, 2001) 3, 6, 7, 8, 12

Peters v. Jim Lupient Oldsmobile Co., 220 F.3d 915 (8th Cir. 2000) 3, 5

Procter & Gamble Co. v. Amway Corp., 242 F.3d 539 (5th Cir. 2001) 4, 18

Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989) 16

Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998) 3, 17

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 15

Stout v. J.D. Byrider, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1088 (U.S. Feb. 20, 2001) 3, 5, 6

Summit Properties, Inc. v. Hoechst Celanese Corp., 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (U.S. Jan. 22, 2001) 4, 16, 17

Tabas v. Tabas, 47 F.3d 1280 (3d Cir.), *cert. denied*, 515 U.S. 1118 (1995) 3, 16, 17

STATUTES AND RULES

12 U.S.C. §1818 11

12 U.S.C. §1818(e) 11

12 U.S.C. §1818(i) 11

15 U.S.C. §45 10

15 U.S.C. §1607(a) 10

15 U.S.C. §1607(a)(1) 11

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. §1607(c) 10

15 U.S.C. §1607(e)(1) 11

15 U.S.C. §1611 11

15 U.S.C. §1640 7

15 U.S.C. §1640(a)(1) 4, 5, 6, 7, 8

15 U.S.C. §1640(a)(2) 8

15 U.S.C. §1640(a)(2)(B) 9

15 U.S.C. §1667(d) 7

18 U.S.C. §1964(c) 1

Fed. R. Civ. P. 23(b)(3) 6

PUBLIC LAWS

Consumer Leasing Act, 15 U.S.C. §1667-1667(e) (1976) 7

Securities Exchange Act of 1934 9

Act of October 28, 1974, §407, Pub. L. No. 93-495, 88 Stat. 1500 (1974) 14

Truth in Lending Amendments Act of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995) 12

LEGISLATIVE HISTORY

H.R. Rep. No. 90-1040 (1968) 11

H.R. Rep. No. 104-193 at 258, 104th Cong., 1st Sess. (1995) 12

S. Rep. No. 93-278 at 14-15 (1974) 13

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 720, 95th Cong. 2d Sess. 16 (1978) 14

S. Rep. No. 73, 96th Cong. 1st Sess. 18 (1979)..... 14

119 Cong. Rec. 25418 (July 23, 1973) 13

119 Cong. Rec. 25419 (July 23, 1973) 14

141 Cong. Rec. H9516 (Sept. 27, 1995)..... 13

MISCELLANEOUS

Black's Law Dictionary 35 (6th ed. 1990)..... 7

COUNTERSTATEMENT OF THE CASE

While denial of the petition for a writ of certiorari (the "Petition") does not depend upon factual matters, Respondents offer this Counterstatement of the Case to apprise the Court of certain significant facts that were omitted from Petitioner's Statement of the Case.

Most significantly, Petitioner fails to mention that it is undisputed that she did not even read, much less rely upon, the allegedly deficient TILA disclosure statements that were given to her. As the Eleventh Circuit observed, "Turner concedes that she did not read Beneficial's disclosure statements at the time of receipt and therefore did not rely on them." (Pet. App. 3-4; 19).

In addition, Petitioner is wrong in arguing that Respondents' disclosures violated TILA and that "Beneficial did not dispute Turner's claim that the disclosures were improper." Petition at p. 8. To the contrary, Respondents have always maintained throughout this litigation that it was proper under TILA to provide Petitioner with the disclosures applicable to open-end, rather than closed-end, credit transactions.

Also, Petitioner's recitation of the proceedings in the Eleventh Circuit is incomplete. In its December 21, 2000 opinion, the panel unanimously concluded that, based on the Eleventh Circuit's earlier decision in *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991), a plaintiff alleging a violation of Section 1964(c) of RICO that is predicated on mail or wire fraud must show detrimental reliance on the alleged misrepresentations. (Pet. App. 30-31).

On the TILA claim, the panel stated that "[w]e agree with Beneficial, and with the other Courts of Appeal that have addressed the issue, that the plain language of TILA's actual damages provision requires a showing of detrimental reliance as part of any claim for actual TILA damages." (Pet. App. 29). However, it stated that it was "bound" by an earlier panel decision in another case that had refused to impose a reliance requirement for TILA actual damages. (Pet. App. 30). The panel stressed that, in its view, the earlier panel decision was "wrongly decided, and this should be rectified by the *en banc* Court." (Pet. App. 30).

Two weeks later, on January 3, 2001, the Court *sua sponte* granted rehearing *en banc*. (Pet. App. 33). Thereafter, by an 11-0 vote, the *en banc* Court held, consistent with all other courts of appeals, that "detrimental reliance is an element of a TILA claim for actual damages, that is a plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his damages." (Pet. App. 12).

ARGUMENT

The vast majority of the Petition is devoted to the contention that the Eleventh Circuit erred by requiring proof of a borrower's reliance on the challenged disclosures by the creditor in order to recover actual damages under TILA. However, Petitioner has not identified any decision by any appellate court that conflicts with the Eleventh Circuit's unanimous *en banc* decision in this case. To the contrary, within just the past year, three other

courts of appeals have held that reliance is required to recover TILA actual damages, and this Court denied certiorari in two of those cases. *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1601 (U.S. April 16, 2001); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 1088 (U.S. Feb. 20, 2001); *Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915, 917 (8th Cir. 2000).

The Petition also argues in passing that certiorari is warranted to resolve the question of whether, in a civil RICO action predicated on mail or wire fraud, the plaintiff must prove detrimental reliance on the alleged misrepresentations. The Eleventh Circuit established a detrimental reliance requirement ten years ago, and it adhered to that precedent in this case. Petitioner argues that the Eleventh Circuit's detrimental reliance requirement conflicts with a footnote in *Tabas v. Tabas*, 47 F.3d 1280, 1294 n. 18 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995), but that footnote was mere dicta. Also, more recent decisions in the Third Circuit cast substantial doubt on the vitality of the *Tabas* dicta. *See Ideal Dairy Farms, Inc. v. John Labatt, Inc.*, 90 F.3d 737, 746-47 (3d Cir. 1996); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998); *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 233 n. 1 (E.D. Pa. 1999) ("Courts within this Circuit have generally held that in order to state a RICO claim, the plaintiff must show reliance on the underlying mail or wire fraud.").

Petitioner's effort to manufacture the appearance of a conflict between the Eleventh Circuit's decision on the RICO claim and Fifth Circuit precedent is equally

unavailing. Petitioner cites a nine-year old case,[1] but ignores recent decisions in which the Fifth Circuit, like the Eleventh Circuit, has repeatedly held that "[i]n civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 564 (5th Cir. 2001); *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (U.S. Jan. 22, 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).

Accordingly, certiorari should be denied.

I. The Circuit Courts Uniformly Have Held That Plaintiffs Must Prove Detrimental Reliance to Recover Actual Damages Under TILA

The 11-0 *en banc* decision by the Eleventh Circuit holding that a plaintiff must demonstrate detrimental reliance to recover actual damages under Section 130(a)(1) of TILA, 15 U.S.C. §1640(a)(1), is supported by the plain language of that provision:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to . . . (1) any actual damage sustained by such person *as a result of the failure*; . . .

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[1] *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533 (5th Cir. 1992).

15 U.S.C. §1640(a)(1) (1998) (emphasis added). As the Eleventh Circuit correctly recognized, "this language indicates that the statute's authors intended that plaintiffs must demonstrate detrimental reliance in order to be entitled to actual damages under TILA." (Pet. App. 12).

There are *no* appellate decisions that conflict with the Eleventh Circuit's decision. To the contrary, three other courts of appeals considered this issue last year, and each of them held that detrimental reliance is indeed a necessary element of a TILA actual damages claim.

The first of these three recent opinions was *Peters*, which was decided by the Eighth Circuit on August 11, 2000. The Court affirmed the entry of summary judgment for the defendant on plaintiff's claim for actual damages under TILA. The Court agreed with several district court decisions that "the plaintiff must show a real loss or injury caused by the defendant," and it held as follows:

> In order to establish these actual damages, courts have required the plaintiff to show the TILA violation was the proximate cause of any actual damages . . . In order to show causation, a plaintiff must show that: (1) he read the TILA disclosure statement; (2) he understood the charges being disclosed; (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price.

220 F.3d at 916-917 (citation omitted).

One month later, on September 8, 2000, the Sixth Circuit affirmed the denial of class certification on a TILA actual damages claim in *Stout*. The Sixth Circuit found that the need for each class member to prove reliance

precluded satisfaction of the Rule 23(b)(3) predominance requirement:

> In this case, the district court determined that the factual core of the case was whether each putative class member relied upon false representations or failures to disclose, and if so, what damages were proximately caused by that reliance. We find that this determination did not constitute an abuse of discretion by the district court in light of the fact that any resolution of the fraud or the TILA claims requires an individual assessment of what documents the customer reviewed and in what manner, what representations Defendants made to each customer, and whether the customer selected the extended service agreement.

228 F.3d at 718. This Court denied certiorari in *Stout* on February 20, 2001. 121 S. Ct. 1088.

The *Perrone* opinion was rendered by the Fifth Circuit on November 2, 2000. This Court denied certiorari in *Perrone* on April 16, 2001. 121 S. Ct. 1601. The Fifth Circuit's opinion is comprehensive in scope, and its cogent reasoning amply supports its conclusion that "detrimental reliance is an element of a claim for actual damages" under TILA. 232 F.3d at 434. Just as the Sixth Circuit held in *Stout* and the Eleventh Circuit held in this case, the Fifth Circuit found in *Perrone* that "[s]ince individual reliance is necessary to prove actual damages, a class action may not be certified on this issue." *Id.* at 440.

The Fifth Circuit's opinion in *Perrone* begins with an analysis of the statutory language in 15 U.S.C. §1640(a)(1), which states that a creditor is liable to the

borrower for "any actual damage sustained by such person *as a result of the failure*" to comply with TILA:

> Black's Law Dictionary defines actual damages as "compensation for actual injuries or loss." *Black's Law Dictionary* 35 (6th ed. 1990). They "flow[ ] from injury in fact" and "make good or replace the loss *caused* by the wrong or injury." *Id.* (emphasis added). According to its plain meaning, the statutory remedy of "actual damages" in section 1640(a)(1) requires a direct causal relationship between the amount of damages and the injury or harm. That the "actual damages" must be "sustained by such person as a result of the failure" links the loss to the failure to disclose. 15 U.S.C. §1640(a)(1). *Actual damage is thus sustained as a result of a failure to disclose under the statute if a consumer can show that, had he been properly informed, he would have engaged in a different or less-expensive transaction.*

232 F.3d at 435-36 (emphasis added).

In *Perrone*, the Fifth Circuit stated that, in addition to the fact that the detrimental reliance requirement is supported by the "plain meaning" of the statutory language, "the requirement becomes manifest when §1640(a) is placed in its statutory context and contrasted with the statutory liquidated damages provision." 232 F.3d at 436. The Court explained that:

> The CLA[2] recognizes, however, that damages in these individually small transactions may be

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[2] The CLA is the Consumer Leasing Act, 15 U.S.C. §§1667-1667(e), which comprises Chapter 5 of the TILA and adopts TILA's civil remedies provision, including the actual damages remedy, for violations of lease disclosure requirements. 15 U.S.C. §§1640, 1667(d).

> difficult to prove and adjusts its remedy to afford actual damages or at least a statutory minimum. A comparison of these provisions supports the conclusion that actual damages are based on detrimental reliance. While the actual damages provision requires a causal connection with the disclosure violation, 15 U.S.C. §1640(a)(1), the statutory damages provision dispenses with causation and imposes a penalty solely for failure to comply with disclosure requirements. 15 U.S.C. §1640(a)(2). *Without a causation requirement, actual damages would overlay the statutory damages for no apparent reason. Conceptually, however, statutory and actual damages perform different functions: statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. Actual damages may be recovered where they are probably caused by the violation. In this way, the damage measures are complementary rather than duplicative.*
>
> The caselaw confirms that statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist . . . On the other hand, actual damages have consistently been recognized as more difficult to prove . . . The distinction between statutory and actual damages comports with the notion that actual damages must be assessed as an individualized harm.

232 F.3d at 436-37 (emphasis added, citations omitted).

In sum, no conflict exists among the Circuits requiring resolution by this Court. All four circuit courts that have examined the issue have agreed that detrimental

reliance on the challenged disclosure statements must be shown to recover actual damages under TILA.

II. The Decision Below Presents No Question of Exceptional Importance

Apparently dissatisfied with the $500,000 ceiling on statutory damages recoverable in a TILA class action (15 U.S.C. §1640(a)(2)(B)), Petitioner contends that "detrimental reliance cannot be imposed as an element of a TILA actual damages claim, because to do so makes the recovery of actual damages and the prosecution of a class action almost impossible." (Petition at 13). However, Petitioner's view of proper "[p]olicy considerations cannot override [the] interpretation of the text and structure of [an] Act." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 168 (1994).

In *Central Bank*, this Court held that no civil liability exits for "aiding and abetting" under Section 10(b) of the Securities Exchange Act of 1934, because the "words 'aid' and 'abet' were not part of the statutory text." 511 U.S. at 176-77. In response to the policy argument that civil aiding and abetting liability would advance the purposes of the Securities Exchange Act, the Court stressed that the "issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* at 177.

Here, too, Petitioner's personal opinions as to the assertedly inadequate deterrent effect of the TILA statutory damages remedy cannot override the balance struck by Congress between the need to deter potential violations and the desire to avoid subjecting creditors to

ruinous liability without proof of "actual damages" sustained "as a result of" a disclosure violation. As the Eleventh Circuit stated, "Congress placed [a] ceiling on a defendant's statutory [damages] liability in a class action so that courts would no longer have to 'choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations." (Pet. App. 7).

Petitioner's hyperbole that a detrimental reliance requirement for actual damages under TILA "reduces that statute to a shell of the statute Congress intended and created" (Petition at 27) ignores the statutory damages provision, which does not require proof of detrimental reliance, as well as the many other powerful enforcement mechanisms in TILA pointed out by the Eleventh Circuit (Pet. App. 5-6), which deter wrongdoing by creditors. As the Third Circuit recently commented, "[t]hese provisions offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role." *Johnson v. West Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1081 (U.S. Feb. 20, 2001).

TILA gives general enforcement power to the Federal Trade Commission as its "overall enforcing agency," and permits it to employ its powers under the Federal Trade Commission Act, *see* 15 U.S.C. §1607(c), such as the issuing of cease and desist orders, *see* 15 U.S.C. §45. TILA also grants enforcement authority to the variety of Federal banking agencies that regulate lending institutions. *See* 15 U.S.C. §1607(a). In the event of a violation, the enforcing agencies are authorized to "make an adjustment to the account of the person to whom credit was extended, to

assure that such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower." 15 U.S.C. §1607(e)(1). TILA also imposes criminal liability on persons who willfully and knowingly violate the statute. 15 U.S.C. §1611. TILA also cross-references section 8 of the Federal Deposit Insurance Act, 12 U.S.C. §1818, which sets forth other enforcement powers, *see* 15 U.S.C. §1607(a)(1). Under Section 8 of the Federal Deposit Insurance Act, the banking agencies may impose monetary penalties of up to $5,000 per day (or $25,000 per day if the violations are part of a pattern of misconduct), *see* 12 U.S.C. §1818(i), or in some instances order the suspension and removal of institution directors or officers, *see* 12 U.S.C. §1818(e).[3]

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[3] The legislative history surrounding the original enactment of TILA in 1968 reflects the importance of administrative enforcement in securing the rights of most consumers. The House Report, prepared by the Committee on Banking and Currency, explained that enforcement on the administrative level was essential to the legislative purpose of the Act. *See* H.R. Rep. No. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1975. "For the relatively unsophisticated consumer, particularly those of modest means, administrative enforcement will provide their only protection against unscrupulous merchants or lenders." *Id.* The Report also characterizes the civil remedies as secondary to the administrative ones. "While primary enforcement of the bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor." *Id.* at 1976.

III. The Legislative History of TILA Supports a Detrimental Reliance Requirement

As recognized by both the Eleventh Circuit in this case (Pet. App. 12) and the Fifth Circuit's opinion in *Perrone* (232 F.3d at 440 and n. 7), the conclusion that detrimental reliance is an essential element of a claim for actual damages under TILA is compelled not only by the plain meaning of the statutory language, but also by the legislative history of TILA.

There is ample legislative history showing that Congress has long intended to require proof of reliance to recover actual damages under TILA, and has repeatedly recognized that, as a result, actual damages will be very difficult to prove. As the Eleventh Circuit noted (Pet. App. 12), the legislative history of the Truth in Lending Amendments Act of 1995 (Pub. L. No. 104-29, 109 Stat. 271) reaffirmed the requirement of detrimental reliance. The House Report stated as follows:

> Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove. *To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*

H.R. Rep. No. 104-193 at 258 (104th Cong., 1st Sess.) (1995) (emphasis added).

In the course of adopting this legislation, one of its sponsors stated:

> Section 130(a) of TILA allows a consumer to recover both actual and statutory damages in

> connection with TILA violations. However, statutory damages are provided in TILA because actual damages, which require proof that the borrower suffered loss in reliance on the inaccurate disclosure, are extremely difficult to establish. *To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*

141 Cong. Rec. H9516 (September 27, 1995) (statement of Rep. McCollum) (emphasis added).

The Senate Report discussing the 1974 amendments to TILA, which capped the statutory damages available in class actions and also provided for the recovery of actual damages, stated that "[s]ince *it is difficult to prove any actual monetary damage arising out of a disclosure violation,* the Act provides that a consumer bringing a successful action is entitled to collect court costs and reasonable attorney's fees plus twice the amount of the finance charge but not less than $100 nor more than $1,000." S. Rep. No. 93-278, at 14 (1974) (emphasis added). This Report further states that " *'[m]ost Truth in Lending violations do not involve actual damages* and . . . some meaningful penalty provisions are therefore needed to ensure compliance.' " *Id.* at 15 (emphasis added).

There are numerous such statements throughout the legislative history of TILA:

> "While there is no limit on actual damages under the Truth in Lending Act, there are almost never any actual damages." 119 Cong. Rec. 25418 (July 23, 1973) (remarks of Sen. Proxmire).

* * *

> "The actual damages resulting from abuses of disclosure . . . are usually negligible or extremely difficult to prove." 119 Cong. Rec. 25419 (July 23, 1973) (remarks of Sen. Hart).
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> * * *
>
> " . . . without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." S. Rep. No. 720, 95th Cong., 2d Sess. 16 (1978).
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> * * *
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> " . . . without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." S. Rep. No. 73, 96th Cong. 1st Sess. 18 (1979).

Petitioner's view that actual damages should be automatically recoverable in the event of a TILA violation flies in the face of legislative history and judicial decisions spanning 27 years, which have consistently recognized that actual damages are very difficult to prove and thus will often not be recoverable. Moreover, adoption of Petitioner's position would subject creditors with large portfolios to potentially ruinous actual damages in class actions, enabling plaintiffs' class action attorneys to do an end-run around the class action statutory damages ceiling imposed by Congress in 1974. Act of October 28, 1974, §407, Pub. L. No. 93-495, 88 Stat. 1500 (1974). Without a detrimental reliance requirement for actual damages, the problem of run-away statutory penalties in TILA class actions that existed in the early 1970's would be replaced

by the specter of unlimited actual damages in such actions.

IV. The Eleventh Circuit's Requirement of Detrimental Reliance For Civil RICO Actions Predicated on Mail or Wire Fraud Does Not Conflict with the Third or Fifth Circuits

The Petition briefly argues that there is a purported conflict between the decision of the Eleventh Circuit and holdings of the Third and Fifth Circuits on the question of whether a plaintiff alleging a civil RICO claim predicated on mail or wire fraud must prove detrimental reliance on the alleged misrepresentations. No such conflict exists.

The Eleventh Circuit's unanimous panel decision in this case adhered to its longstanding rule, first articulated in 1991, that a plaintiff alleging a RICO claim based on mail or wire fraud "must have relied to his detriment on misrepresentations made in furtherance" of the alleged scheme to defraud. (Pet. App. at 31), *quoting Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). As the Eleventh Circuit pointed out in both this case and *Pelletier*, the detrimental reliance requirement is supported by this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985), where the Court held that, under Section 1964(c) of RICO, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Thus, plaintiff's damages must "flow from the commission of the predicate acts." *Id.* at 497.

Petitioner argues that the Eleventh Circuit's detrimental reliance requirement conflicts with decisions by

the Third and Fifth Circuits, but she cites outdated cases and ignores more recent decisions by those courts that, like the Eleventh Circuit and numerous other circuits,[4] impose a detrimental reliance requirement. Such a requirement is compelled by the plain language of Section 1964(c), which provides that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor . . . " (emphasis added). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992), this Court explicitly confirmed that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and a plaintiff's injury that includes "but for" and "proximate" causation. The detrimental reliance requirement "is consistent with *Holmes'* admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 560 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (U.S. Jan. 22, 2001).

Petitioner's reliance on a footnote in *Tabas v. Tabas*, 47 F.3d 1280, 1294 n. 18 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995) is misplaced, because that footnote was mere *dicta*.[5] More recent Third Circuit decisions plainly

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[4] *See, e.g., Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989).

[5] The Court's decision did not turn on the reliance issue, but instead focused on RICO's "continuity" requirement.

show that it has not abolished the reliance requirement. For instance, in *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996), the Court affirmed the dismissal of a RICO claim for the same reasons it affirmed the dismissal of a common law fraud claim: "[Plaintiff] cannot now claim that it detrimentally relied on [defendant's] intentional misrepresentation because [plaintiff] knew it was being overcharged for purchases almost from the start." Similarly, in *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998), the Third Circuit affirmed the dismissal of a RICO claim based on a land fraud scheme because plaintiffs failed to allege what statements they relied upon.

Moreover, other courts have recognized that the *dicta* in the *Tabas* footnote is not controlling law in the Third Circuit. In a post-*Tabas* decision by a district court within the Third Circuit, the court stated that "[c]ourts within this Circuit have generally held that in order to state a RICO claim, the plaintiff must show reliance on the underlying mail or wire fraud." *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 233 n. 1 (E.D. Pa. 1999) (citations omitted). Similarly, in *Summit Properties*, the Fifth Circuit observed that many circuits "require a showing of detrimental reliance by the plaintiff" to state a RICO claim, and in support of that proposition it cited the *Ideal Dairy Farms* decision by the Third Circuit. 214 F.3d at 560 and n. 16.

Nor does the Eleventh Circuit's decision conflict with the Fifth Circuit. Once again, Petitioner has disregarded a number of very recent Fifth Circuit decisions that have *required* detrimental reliance to state a RICO claim. *See, e.g., Summit Properties*, 214 F.3d at 562:

> In sum, when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a common-sense liability limitation. To hold otherwise would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products, even if no plaintiff relied on those representations.

Accord Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 564 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).

Accordingly, there is no conflict between the circuits that has been created by the Eleventh Circuit's holding on the RICO claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN S. KAPLINSKY
BURT M. RUBLIN
Counsel of Record
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Respondents

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